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KUMARAGURU THANDAVATHEVAR v. OOI SOO TEIK & ANOR

HIGH COURT MALAYA, PULAU PINANG
AZMI ABDULLAH JC
[CIVIL SUIT NO: PA-22NCVC-89-05-2016]
B 21 JULY 2017

CONTRACT: *Agreement – Breach – Sale and purchase agreement for sale of property between purchaser and developer – Developer failed to hand over possession of property and/or complete common facilities within stipulated period – Developer*
C *owed liquidated ascertained damages ('LAD') to purchaser – Purchaser instructed bank not to release payment in order to set off balance of purchase price with LAD – Whether purchaser in breach of sale and purchase agreement for failing/neglecting to pay balance purchase price*

LAND LAW: *Indefeasibility of title and interests – Transfer – Developer failed to*
D *hand over possession of property and/or complete common facilities within stipulated period – Developer owed liquidated ascertained damages ('LAD') to purchaser – Purchaser instructed bank not to release payment in order to set off balance of purchase price with LAD – Developer sold property to third party as agreement with purchaser deemed annulled – Third party sold property to fourth*
E *party – Whether purchaser was beneficial owner of property – Whether developer was holding property as bare trustee – Whether developer had any interest and/or rights in property which was transferable to third party – Whether third party had any interest and/or rights transferable to fourth party – Whether transfers valid – National Land Code, s. 340(2)*

F The plaintiff entered into a sale and purchase agreement ('the 1994 SPA') with Ever Noble Sdn Bhd ('Ever Noble'), a housing developer, for the purchase of an apartment ('the property') at the price of RM159,500. The plaintiff took a loan of RM127,000 from Pacific Bank Bhd ('the bank') and the loan was secured by an assignment of the property to the bank. Malayan
G Banking Bhd ('MBB') subsequently acquired the bank and the property was assigned to MBB. Ever Noble later failed to hand over possession of the property and/or complete the common facilities within 36 months from 20 December 1994. Ever Noble's progress billing for stage 2(f) of the Schedule of payment of purchase price was only issued on 4 January 2000.
H The sum demanded was RM23,925 ('the sum from the loan') and the due date for payment was 17 January 2000. However, on 17 January 2000, Ever Noble owed the plaintiff liquidated ascertained damages ('the LAD') amounting to RM39,745.84, far in excess of the sum demanded for stage 2(f). The plaintiff, wanting to pay the instalment for stage 2(f) by way of set-off
I against the LAD, instructed the bank not to release the sum from the loan. However, the bank refused to comply with the plaintiff's instruction and on

8 September 2000, released the sum from the loan to Ever Noble. This meant that, together with the sum from the loan, the total LAD due from Ever Noble was RM52,033.59 whereas the total balance of purchase price payable to Ever Noble for stages three and four was only RM39,000. The plaintiff successfully obtained an injunction, restraining MBB from releasing any payment to Ever Noble. Stage three was only completed six years after the completion of stage 2(f) in 2000. After a delay of more than eight years, the housing development and common facilities were completed in 2006. The plaintiff wanted to pay the balance by way of-set off against the LAD. Ever Noble informed the plaintiff that since he failed and/or neglected to settle the 20% payment, he had breached the 1994 SPA and therefore, the 1994 SPA shall be deemed to be annulled. The plaintiff applied for an interim injunction against Ever Noble at the High Court ('the civil suit') and the latter was restrained and prevented from selling the property until the disposal of the action. In resisting the interim injunction, Ever Noble argued that by a sale and purchase agreement ('the 2007 SPA'), it had sold the property to Nexus Holdings Sdn Bhd ('Nexus'). Nexus later sold and assigned the property to the defendants but this fact was not disclosed by Ever Noble before the court granted the order in the civil suit. A title search carried out in 2014 by the plaintiff revealed that in 2010, Ever Noble had transferred the property to the defendants. This prompted the plaintiff to commence the present claim. In support of his claim, the plaintiff submitted that (i) he had an earlier SPA with Ever Noble for the sale of the property and therefore, his title to the property should prevail over the defendants' as he was the first and earliest purchaser; (ii) Ever Noble held the property for him on a bare trust in his favour and had no title to pass on to Nexus and the defendants; (iii) the defendants' title to the property was defeasible as the said registration was insufficient and/or by void instrument and should be set aside; and (iv) the defendants were not *bona fide* purchasers.

Held (allowing claim with costs):

(1) The plaintiff did not breach the 1994 SPA when he did not pay the sum demanded by Ever Noble for stages three and four since, by this time, the LAD had far exceeded the required payments for stages three and four due to the prolonged delay of the project. The balance of purchase price due to the developer and the LAD due to the plaintiff arose from the same transaction. The plaintiff had a right to set-off to reduce the sum he owed the developer. (paras 46 & 47)

(2) The plaintiff's entitlement to set-off was already confirmed by the civil suit. The order clearly confirmed that Ever Noble's termination of the 1994 SPA was invalid and that the plaintiff was the owner of the property. Ever Noble knew all along and was aware that the plaintiff was exercising his right to set-off the balance purchase price against the LAD. Hence Ever Noble did not have the right to terminate the 1994

SPA. This meant that since 8 September 2000, the plaintiff had become the beneficial owner of the property as it was the date the bank proceeded to release the sum of RM23,925 from the loan to satisfy the payment for stage 2(f) to Ever Noble against the plaintiff's protestations. (paras 48 & 49)

(3) From September 2000 onwards, Ever Noble was merely holding the property as bare trustee or constructive trustee for the plaintiff. The plaintiff had become the beneficial owner by way of set-off by way of court order obtained in 2010. The plaintiff was fully-vested with the rights, title and interest to the said property and which rights, title and interest were assigned to MBB. (paras 53 & 55)

(4) Upon the strata title being issued in 2008 to the developer, Ever Noble had the duty under cl. 10 of the 1994 SPA to execute a valid and registrable memorandum of transfer of the said property to the plaintiff and an undertaking to MBB had already been given in the loan agreement cum assignment to deliver a valid and registrable instrument of transfer together with the issue document of title of the said property upon the same being obtained from the land authority. Pertaining to the 2007 SPA, at that material time, the plaintiff was already the beneficial owner of the property. Therefore, Ever Noble, being merely a bare trustee of the property, did not have a legal interest to transfer the said property to Nexus. Consequently, the defendants who entered into the agreement with Nexus could not acquire any interest in the said property from Nexus as Nexus, at the material time, had no legal right in the property to sell, assign and/or transfer to the defendants. (paras 56, 57 & 59)

(5) This was not a case of two equally competing parties. The defendants should have exercised greater diligence before buying the said property, knowing fully-well that the project was long delayed. They were, at the very least, careless or negligent for purchasing the property without fully investigating the real position of the property. Ever Noble did not have a good title to transfer and was not in the position to pass on and vest the defendants with the title when the transfer was registered. As the transfer form was a void instrument, it must be set aside under s. 340(2)(b) of the National Land Code. (paras 65, 67, 70 & 71)

(6) The failure to lodge a caveat did not affect the plaintiff's prior equitable rights, title and interest in the property in question. Furthermore, the plaintiff could only lodge a caveat on the title to the parcel issued in 2010, which, according to evidence, was only known to the plaintiff in 2014 and not on the land title. (para 72)

Case(s) referred to:
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***
Foo Ah Kow & Anor v. Yeap Poh Lum & Ors [2016] 6 CLJ 686 CA ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA ***(refd)***
Tan Ong Ban v. Teoh Kim Heng [2016] 3 CLJ 193 FC ***(refd)***

Legislation referred to:
National Land Code, s. 340(2)(b), (3)
Strata Titles Act 1985, s. 34(1)

For the plaintiff - M Thayalan; M/s See Ching Ling & Co
For the defendants - HK Neoh; M/s BC Teh & Yeoh

Reported by Najib Tamby

JUDGMENT

Azmi Abdullah JC:

Introduction

[1] This is an action pertaining to the competing ownership of a strata title.

[2] The plaintiff purchased a unit known as Parcel No. HC 12-03, 12th Floor, Horseshoe Tower ('the said property") in a housing development known as Menara Kuda Lari from a housing developer Ever Noble Sdn Bhd ("Ever Noble").

[3] The first and second defendants are the registered proprietors of an apartment known as Parcel No. HC 12-03, 12th Floor, Block C (Horseshoe Tower), Menara Kuda Lari, Jalan Lahat, 10250 Georgetown, Penang ("the apartment"). The strata title of the apartment was registered in the first and second defendants' name on 9 August 2010.

[4] The defendants had purchased the apartment *vide* a sale and purchase agreement dated 18 April 2007 (the "defendants' SPA") from a company known as Nexus Holdings Sdn. Bhd. ("Nexus Holdings").

[5] Nexus Holdings had in turn purchased the apartment from a company known as Ever Noble Sdn Bhd ("Ever Noble") *vide* a sale and purchase agreement dated 8 January 2007. Nexus Holdings had paid the purchase price of the apartment in full.

[6] The apartment was part of the Menara Kuda Lari property development (the "project") which is situated on lands known as Lots No. 701 and 717, Seksyen 2, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran No. 18314 and 39385 (the "land").

The Trial Process

[7] The trial took two days, on 22 November 2016 and 24 November 2016.

[8] The trial documents comprised of:

(i) Ikatan pliding ("A:)

(ii) Ikatan dokumen bersama yang dipersetujui ("B")

(iii) Ikatan dokumen bersama yang dipersetujui tambahan ("C")

(iv) Fakta-fakta yang dipersetujui ("D")

(v) Isu-isu untuk dibicarakan (yang dibangkitkan oleh plaintif) ("E")

(vi) Isu-Isu untuk dibicarakan yang dipersetujui ("F")

[9] The following witnesses testified for the respective parties:

(i) Kumaraguru a/l Thandavathevar ("SP1") the plaintiff

(ii) Chee Yee Sze ("SD1") the second defendant

The witness statements of these witnesses were marked as "WSP1" and "WSD1" respectively.

[10] After the trial, the parties simultaneously submitted their respective submissions in chief and in reply. Oral clarifications by both counsel proceeded on 11 April 2017.

Background Facts

[11] By a sale and purchase agreement ("1994 SPA") dated 20 December 1994 the plaintiff directly purchased the apartment from Ever Noble for a consideration of RM159,500. The 1994 SPA was subject to the Housing Development (Control and Licensing) Act 1966 ("HDA") and was the standard form Schedule H agreement that is for subdivided building, under the Housing Development (Control and Licensing) Regulations 1989.

[12] The said property is to be built on a land known as Lot Nos. 701 and 717, Section 2 Town of Georgetown, North East District, Penang held under Grant (First Grade) Registration Nos. 18314 and 39385. At the material times, the strata title of the said property had not been issued.

[13] The plaintiff took a loan of RM127,000 from Pacific Bank Berhad and was secured by way of an assignment of the said property to Pacific Bank Berhad. Pacific Bank Berhad was subsequently acquired by Malayan Banking Berhad and the said property was at all material times assigned to Malayan Banking Berhad. Ever Noble had consented to the assignment and gave an undertaking to the plaintiff's financier.

[14] The purchase price was to be paid in instalments progressively upon each stage of completion according to the schedule of payment of purchase price that is the Third Schedule of the 1994 SPA.

[15] Under cl. 22 of the 1994 SPA, Ever Noble was supposed to hand over vacant possession of the said property to the plaintiff within 36 months from 20 December 1994 failing which Ever Noble shall immediately pay to the plaintiff liquidated ascertained damages (hereinafter referred to as "LAD") to be calculated from day to day at the rate of 10% per annum of the purchase price.

[16] Further, under cl. 24 of the 1994 SPA, Ever Noble was supposed to complete the common facilities serving the housing development within 36 months from 20 December 1994, failing which the developer shall pay to the plaintiff immediately the LAD calculated from day to day at the rate of 10% per annum of 20% of the purchase price.

[17] Ever Noble breached cls. 22 and 24 of the SPA 1994 and failed to hand over vacant possession of the said property and/or complete the common facilities within 36 months from 20 December 1994 that is by 20 December 1997.

[18] Ever Noble's progress billing for stage 2(f) of the schedule of payment of purchase price was only issued on 4 January 2000. The sum demanded was RM23,925 and the due date for payment was 17 January 2000. However, on 17 January 2000 Ever Noble owed the plaintiff LAD amounting to RM39,745.84 ie, far in excess of the sum demanded for stage 2(f).

[19] The plaintiff wanted to pay the instalment for stage 2(f) by way of set-off against the LAD. The plaintiff instructed Pacific Bank Berhad not to release the sum of RM23,925 from the loan through his solicitor's letter dated 21 February 2000. The reason was because the monies due from Ever Noble to him was in excess of the monies due from him to Ever Noble. However, Pacific Bank Berhad refused to comply with the plaintiff's instruction and on 8 September 2000 it proceeded to release the sum of RM23,925 from the loan to Ever Noble.

[20] After taking account the sum of RM23,925 released by Pacific Bank Berhad to Ever Noble on 8 September 2000 for stage 2(f) the total LAD due from Ever Noble was RM52,033.59 whereas the total balance of purchase price payable to Ever Noble for stages 3 and 4 was only RM39,000.

[21] By order of court dated 13 September 2001 *via* Penang High Court Originating Summons No. 24-1999-2000, the plaintiff obtained the following injunction against Malayan Banking Berhad named as the defendant:

> ADALAH DIPERINTAHKAN bahawa Defendan atau kakitangan atau ejen Defendan dihalang dari melepaskan apa-apa bayaran kepada Ever Noble Sdn Bhd dibawah Perjanjian Pinjaman Bersama Serahak bertarikh 16hb Mei 1995 di antara Defendan dan Plaintif.

[22] Stage 3 was only completed six years after the completion of stage 2(f) in January 2000. Ever Noble's progress billings for stages 3 and 4 was dated 14 April 2006 and the due date was 27 April 2006. Ever Noble demanded payment of RM39,000 for stages 3 and 4. By April 2006, the LAD payable by Ever Noble to the plaintiff far exceeded this sum of RM39,000.

[23] Stages 3 and 4 refer to handing over of vacant possession with connection of water and electricity supply. The housing development and the common facilities were completed only in April 2006, and Ever Noble was only able to hand over vacant possession of the said property in April 2006. The certificate of fitness for occupation was issued on 4 May 2006. The completion thus had been delayed by more than eight years.

[24] The plaintiff wanted to pay the balance by way of set-off against the LAD. The plaintiff's solicitor on 5 October 2006 wrote a letter to Malayan Banking Berhad with copy of the same to Ever Noble notifying them that the order dated 13 September 2001 obtained in Penang High Court Originating Summons No. 24-1999-2000 was still in force and must be complied with.

[25] Ever Noble in its letter dated 31 October 2006 addressed to the plaintiff and Malayan Banking Berhad stated as follows:

> As at the date of this letter, you and/or your end financiers have failed and/or neglected to settle the said 20.00% payment and you have therefore breached Clause 9 of the said agreement, as such we are exercising our rights under the said Clause 9 of the said agreement and give you notice, as we hereby do, that unless the said 20.00% payment is paid within fourteen (14) days from the date hereof, failing which upon the expiration of this notice, this agreement shall be deemed to be annulled without further reference to you.
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> Kindly also note that in the event of determination of the said agreement, we shall accordingly exercise our right to forfeit 20.00% of the purchase price.

[26] The plaintiff then commenced an action in Penang High Court Suit No. 22-116-2007 (hereinafter referred to as "the civil suit") against Ever Noble. By an interim injunction order dated 25 May 2007 in the civil suit, Ever Noble was restrained and prevented from selling the said property until the disposal of the action or such further order.

[27] In resisting the interim injunction prayed for in the civil suit, Ever Noble disclosed that by a sale and purchase agreement ("Ever Noble/Nexus Holdings agreement") dated 8 January 2007, Ever Noble had sold the same said property to Nexus Holdings Sdn Bhd. The purchase price under the Ever Noble/Nexus Holdings agreement was RM185,000.

[28] The plaintiff's solicitors thereafter wrote several letters to Ever Noble's solicitors to find out who was occupying the said property but the said solicitor refused to respond until half a year later, where by a letter dated 13 March 2008 Ever Noble's solicitors finally disclosed that Nexus Holdings had sold and assigned the said property to the defendants by a sale and purchase agreement dated 18 April 2007 and a deed of assignment dated 14 May 2007. The defendants bought the said property for RM165,000.

[29] By a letter dated 23 July 2008, the plaintiff's solicitors wrote to the defendants at or using the address of the said property to state that Nexus Holdings had no title and/or ownership to sell the said property to the defendants and serving a copy of the order dated 25 May 2007 on the defendants. The letter and the enclosure were returned unclaimed.

[30] However, Ever Noble did not disclose the fact of the sale of the said property to the defendants before the court granted the order dated 25 May 2007 in the civil suit.

[31] Ever Noble was wound up on 6 September 2010 in Penang High Court Companies (Winding-Up) Petition No. 28-60-2010 presented by Foo Ah Kow and Ruby Yeoh Beng Choo who had obtained a judgment against Ever Noble for LAD in relation to a property they had purchased from Ever Noble in the same housing development that is Menara Kuda Lari.

[32] The civil suit came up for full trial on 22 November 2010 and the official receiver representing Ever Noble conceded to the plaintiff's claim. The court granted an order declaring among others that the plaintiff was entitled to set off the balance purchase price against the LAD and Ever Noble had no right to terminate the sale agreement dated 20 December 1994. The court also ordered specific performance of the sale and purchase agreement dated 20 December 1994 and a permanent injunction against Ever Noble from selling the property to any other party.

[33] The strata title to the said property was issued by the Registrar of Land Titles, Penang on 23 October 2008 to Ever Noble. At the time the strata title was issued, the civil suit was still ongoing but this fact was not disclosed by Ever Noble. The plaintiff was not aware and was not be able to know that the strata title to the said property had been issued.

[34] On 1 April 2014, the plaintiff did a title search and learnt that Ever Noble had on 9 August 2010 transferred the said property to the defendants. The said transfer to the defendants was not at all disclosed in the civil suit.

[35] The winding-up petition against Ever Noble was presented on 14 May 2010. The affidavit of service of the petition was filed on 16 June 2010. The transfer of the said property to the defendants was executed by Ever Noble on 2 July 2010 and presented for registration on 9 August 2010 ie, after the date of presentation of the winding-up petition, and after service of the petition on Ever Noble.

[36] On 3 April 2014 the plaintiff lodged a private caveat on the strata title of the said property. The plaintiff issued a notice of action dated 15 March 2016 against the defendants pursued by the present action filed on 20 May 2016.

Contention Of The Parties

[37] The plaintiff claims that he had an earlier sale and purchase agreement with Ever Noble dated 20 December 1994 for the sale of the apartment to him.

[38] The plaintiff claims that Ever Noble held the apartment for him on a bare trust in his favour and had no title to pass on to Nexus Holdings and thereafter the defendants. The plaintiff's case is based on the *nemo dat quod non habet* rule that is the common law rule that no person can give a better title than he had.

[39] The plaintiff thus alleges that the defendants' title to the apartment is purportedly defeasible as the said registration was insufficient and/or by void instrument and should be set aside pursuant to s. 340(2)(b) read together with s. 340(3) of the National Land Code ("NLC").

[40] The plaintiff also contends that the proviso to s. 340(3) of the NLC does not apply at all, and/or because the defendants are not purchasers in good faith.

[41] Finally, the plaintiff contends that his title to the said property should prevail over the defendants' as he is the first and earliest purchaser of the said property.

[42] The defendants contend that they are the current registered proprietors of the apartment. Thus they have indefeasible title to the apartment pursuant to s. 34(1) of the Strata Titles Act 1985 ("STA").

[43] The defendants also allege that the plaintiff has failed to prove that the defendants' title to the apartment was defeasible.

[44] Lastly, the defendants contend that the plaintiff only has a personal contractual claim against the developer and not against third parties including the defendants.

Deliberations Of The Court

[45] From the pleadings and the final submissions of the parties, the principal issues that require determination are:

(a) Whether the plaintiff is entitled to set off the balance of the purchase price with the LAD unilaterally without initially obtaining a court order?;

(b) Whether Ever Noble has executed any official document to transfer the property to the plaintiff?;

(c) Whether Ever Noble has taken all the steps to ensure the plaintiff as the registered proprietor of the property?; A

(d) Whether the plaintiff is the beneficial owner of the property and Ever Noble was holding the property as bare trustee for the benefit of the plaintiff and being responsible to transfer the property to the plaintiff as soon as the strata title was issued?; B

(e) Whether Ever Noble has any interest and/or rights in the property which is transferable to Nexus Holdings?;

(f) Whether Nexus Holdings has any interest and/or rights transferable to the defendants?; C

(g) Whether registered ownership of the property to the defendants has vanquished the rights of the plaintiff?;

(h) Whether the transfer of the property from Ever Noble to the defendants was through voidable instrument making the transfer null and void hence the defendants' ownership was defeasible under s. 340(2) of the National Land Code?; D

(i) (a) Whether the issue of "*bona fide* purchaser for value" is relevant"?

(b) If the answer is yes, whether the defendants had succeeded in proving themselves to be "*bona fide* purchaser for value"?; E

(j) Whether the plaintiff's claim is barred by estoppel since the defendants were not made as parties in the Penang High Court Suit No. 22-116-2007 between plaintiff and Ever Noble?; and

(k) Whether the plaintiff's claim is barred by laches? F

[46] This court is satisfied the plaintiff did not breach the 1994 SPA when he did not pay the sum demanded by Ever Noble in April 2006 for stages 3 and 4 since by this time the LAD has far exceeded the required payments for stages 3 and 4 due to the prolonged delay of the project.

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[47] The balance of purchase price due to the developer and the LAD due to the plaintiff arose from the same transaction. The plaintiff thus has a right to set-off to reduce the sum he owes the developer.

[48] The plaintiff's entitlement to set off has already been confirmed by the Penang High Court decision in Originating Summons No. 24-1999-2000 and in the civil suit. The order dated 22 November 2010 in the civil suit clearly confirms that Ever Noble's termination of the 1994 agreement was invalid and that the plaintiff was the owner of the said property. H

[49] Ever Noble all along knew and was aware that the plaintiff was exercising his right to set-off the balance purchase price against the LAD. Hence Ever Noble did not have the right to terminate the 1994 SPA. This means that since 8 September 2000 the plaintiff had become the beneficial I

owner of the said property, 8 September 2000 being the date Pacific Bank Berhad proceeded to release the sum of RM23,925 from the loan to satisfy the payment for stage 2(f) to Ever Noble against the plaintiff's protestations.

[50] This court refers to the case of *Sentul Raya Sdn Bhd v. Hariram Jayaraman & Ors And Other Appeals* [2008] 4 CLJ 618; [2008] 4 MLJ 852 which also dealt with a sale and purchase agreement governed by the HDA. The following relevant passages are at pp. 623, 626, 629 (CLJ); pp. 857, 859, 861 and 862 (MLJ):

> [3] The appellant is a housing developer. Its activities are controlled and regulated by the Housing Development (Control and Licensing) Act 1966 ('The Act') and the Regulations made thereunder ...
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> [8] The contract which has fallen for construction in the present case is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the schedule form ...
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> [16] The answer once again lies in clause 22(2) of the statutory contract. Once the date for the delivery of vacant possession passed, the appellant's liability to pay liquidated damages calculated in accordance with the formula provided became immediate ...
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> [17] We now turn to the cross appeals. In four of the appeals before us the High Court refused to award the respondents liquidated damages for the period until they obtained actual vacant possession of their respective apartments. The factual position is this. The appellant gave each respondent concerned notice that vacant possession was available. Each notice was accompanied by a statement of the balance sum due from each respondent to the appellant. However there was at the material time liquidated damages owing from the appellant to the relevant respondents. These damages exceeded, in each case, the sum owing from the respondents to the appellant. The respondents were entitled to set off the sums owing to them against the sums owing by them. See, *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] 2 MLJ 31. Accordingly, in our judgment, the notices relied upon by the appellant were clearly invalid because delivery of vacant possession in each case was predicated upon the payment of a sum not due. The relevant respondents were therefore entitled to continue to claim liquidated damages until they took possession of the keys to their respective apartments. There is therefore no merit in the cross appeals.

[51] In the case of *Foo Ah Kow & Anor v. Yeap Poh Lum & Ors* [2016] 6 CLJ 686 which involves a unit at the very same building as the case before this court and which carry very similar facts. In fact, Foo Ah Kow is the very same individual whose action led to the Ever Noble being wound up on 6 September 2010 through Penang High Court Companies (Winding-Up)

Petition No. 28-60-2010. The Court of Appeal decided to agree with the finding of the High Court appealed against, that the developer had no right to terminate the SPA with the defendants as they had paid all the amounts due except the last 20% which was withheld by the defendants as the LAD due to them from the developer exceeded the amount of the 20%. The defendants were entitled to have the balance of 20% of the purchase price set-off from the amount of LAD due to them.

[52] Again quoting from the case of *Foo Ah Kow* at para. (38) with the defendants in the cited case being in the position of the plaintiff in the case before this court, which states:

> In our view, from that point of time when the amount of the LAD due from the developer exceeded the amount of the balance of the purchase price due from the defendants, the defendants had become the beneficial owner of the apartment and the developer in effect a constructive trustee for the defendants.

[53] Hence this court finds that from September 2000 onwards, Ever Noble was merely holding the said property as bare trustee or constructive trustee for the plaintiff.

[54] The Federal Court in the case of *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 elaborated on the concept of bare trustee in the following observations:

> [53] We are in full agreement and adopt the above well founded principles of law which, according to Jessel MR in *Lysaght*'s case, 'has been settled for centuries'. Applying the said principles to the facts of the present case before us, we hold that MPM, being the registered proprietor of the land after the sale and purchase of the agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property); and to borrow the words of Jessel, MR in *Lysaght*'s case '... the court will not permit the vendor afterwards to transfer the legal estate to a third person'. In other words, MPM in the present case, was therefore not permitted in law to sell or transfer the land to the new purchasers (including the appellant).
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> [54] The Court of Appeal was right in finding that MPM, after having entered into the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots. We are in agreement with the Court of Appeal that the subsequent sales, transfers or conveyance of the lots by MPM to the new purchasers (including the appellant) were void *ab initio*, as MPM did not have any legal or requisite capacity to enter into such agreements.

[55] This court finds that the plaintiff in this case has become the beneficial owner by way of the set-off obtained by way of court order obtained dated 22 November 2010 irrespective of the fact that there was no actual payment

to the developer and there being no transfer of the property to the plaintiff's name. Based on the two precedents, this court finds the plaintiff was fully vested with the rights, title and interest to the said property and which rights, title and interest were assigned to Malayan Banking Berhad.

[56] Upon the strata title being issued on 23 October 2008 to the developer, Ever Noble had the duty under cl. 10 of the 1994 SPA to execute a valid and registrable memorandum of transfer of the said property to the plaintiff and an undertaking to Malayan Banking Berhad has already been given in the loan agreement cum assignment to deliver a valid and registrable instrument of transfer together with the issue document of title of the said property upon the same being obtained from the land authority.

[57] Pertaining to the Ever Noble/Nexus Holdings agreement dated 8 January 2007, at that material time, the plaintiff was already the beneficial owner of the property hence Ever Noble being merely a bare trustee of the property did not have a legal interest to transfer the said property to Nexus Holdings Sdn Bhd.

[58] The precedent of *Foo Ah Kow* at p. 39 is cited wherein it is stated that:

> In the circumstances of this, therefore, on the date when the developer purportedly sold the apartment to Sin Chee Hoon, the defendants were already the beneficial owner of the apartment and the developer no longer had any legal interest in the apartment that it could transfer to Sin Chee Hoon. In our view the maxim *nemo dat quod non habit* applied.

[59] This court thus finds that the same maxim is applicable in this case. Consequently, the defendants herein who entered into the agreement with Nexus Holdings dated 18 April 2007 cannot acquire any interest in the said property from Nexus Holdings as Nexus Holdings at the material time had no legal right in the property to sell, assign and/or transfer to the defendants.

[60] The defendants rely very much on the case of *Tan Ong Ban v. Teoh Kim Heng* [2016] 3 CLJ 193 to argue their case. This court has perused the cited case and what has caught this court's attention as relevant and pertinent to be observed is para. 39 of the case which states that:

> In short, a beneficial or equitable owner of a property stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. The only difference is that a beneficial owner is yet to be vested with the legal title.

[61] This paragraph best describes the position of the plaintiff in the case before this court and thus the court finds that the plaintiff though not vested with the legal title is fully entitled to enforce his proprietorship rights against the defendants.

[62] In *Tan Ong Ban* a sale and purchase agreement was entered into between the developer and the plaintiff for an apartment unit. The developer subsequently terminated the agreement with the plaintiff and enclosed a cheque of RM5,250. The plaintiff objected to the termination and returned the cheque. The developer entered into a new sale and purchase agreement with one, Mohd Ismail who then sold the apartment to the first defendant with no strata title having been issued for the apartment unit in dispute. It was decided by the Federal Court that the first defendant was the beneficial owner since he had paid the full purchase price to Mohd Ismail. The plaintiff was not the beneficial owner because he did not pay the full purchase price.

[63] The decision in *Tan Ong Ban* thus was premised on the fact that the plaintiff did not pay the full purchase price whereas the first defendant in the cited case became the beneficial owner owing to the fact that the first defendant had paid the full purchase price to one, Mohd Ismail though no transfer was executed since the strata title was yet to be issued.

[64] In the case before this court, the plaintiff herein has by way of set-off obtained through a court order is deemed to have settled the full purchase price and has acquired the status of beneficial owner.

[65] Pertaining to the Form 14A executed from Ever Noble to the defendants (presented on 9 August 2010 for registration), Ever Noble did not have a good title to transfer at the material time hence was not in the position to pass on and vest the defendants with the title when the transfer was registered.

[66] The passage from *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294 at p. 23 (CLJ); p. 305 (MLJ) is hereby quoted:

> A purchaser of land might fail to obtain a good title in two distinct ways. First, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transactions in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had – *nemo dat quod non habet*.

[67] As the transfer form is a void instrument, it must be set aside under s. 340(2)(b) of NLC. In *Samuel Naik Siang Ting*'s case at para. 66 it was held that under s. 340(2)(b) of NLC the title or interest of any person for the time being registered as proprietor of any alienated land shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument.

[68] In *Foo Ah Kow* at p. 695 it was held pertaining to the transfer from the developer to the subsequent purchasers, similar to this instant case with the plaintiff in the cited case being in the position of the defendants in the present case:

> In our considered view, as the developer (who transferred the strata title to the plaintiffs) no longer owned the apartment at the point of the transfer, the instrument of transfer executed by the developer was a void instrument.
>
> As such, the plaintiff's title or interest purportedly conveyed by way of that void instrument was defeasible by virtue of s. 340(2)(b) of the National Land Code.

[69] On the issue of whether the defendants were *bona fide* purchasers, this court would not go to the extent of finding them as not being *bona fide* purchasers, however in reference to *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136 quoting para. 44 of the case which states that:

> The first defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a manner he is not entitled to the protection of the court.

[70] In following the cited precedent, this court finds that the defendants should have exercised greater diligence before buying the said property knowing fully-well that the project was long delayed. The fact that the defendants were living near the Menara Kuda Lari for a very long time should have alerted them to the fact that the project was long abandoned and they were at the very least careless or negligent for purchasing the property without fully investigating the real position of the apartment of the said project.

[71] This court finds that this is not a case of two equally competing parties as it was decided at para. 79 of *Samuel Naik Siang Ting*'s case that:

> In our view the principle as adopted in *Jasalam (M) Sdn. Bhd*. cannot be applied to the present case for the simple reason that in the present case we are not dealing with two parties with valid equitable interests in the land in question; but with one party (ie the respondent) who claimed to have an equitable interest in the said land as against the other party (ie the appellant) who had purchased the lot based on a void and invalid sale and purchase agreement and later registered his title thereto based on a void instrument, rendering his title defeasible under s. 340(2)(b) of the NLC.

[72] The same precedent also held that the failure to lodge a caveat did not affect the claimant's prior equitable rights, title and interest in the property in question. Furthermore, the plaintiff could only lodge a caveat on the title to the parcel, which was only issued on 23 October 2008 which according to the evidence was only known to the plaintiff in 2014, and not on the land title.

[73] Given the findings of the court, the plaintiff's claim as prayed is allowed with agreed costs of RM10,000.